No. 82-1832

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TOWN OF HALLIE, et al.,
Petitioners,

vs.

CITY OF EAU CLAIRE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for PLF is

established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The antitrust laws of the United States were intended to protect competition and preserve economic freedom and our free enterprise system. Under our federal system, states, when acting as sovereign, are not prevented by the federal antitrust laws from interfering with uninhibited competition. However, municipalities are not entitled to the same deference and, therefore, are subject to the federal antitrust laws.

If municipalities are allowed to restrain competition by favoring their own parochial interests the purpose of the federal antitrust laws will be frustrated. PLF believes that the decision of the Court of Appeals for the Seventh Circuit in *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983), fails to follow the guidelines established by this Court in its previous decisions on the "state action" exemption and believes that the standards established by the Court of Appeals' decision are inconsistent with the policies of the federal antitrust laws.

Pacific Legal Foundation's public policy perspective in support of competition and the free enterprise system will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 700 F.2d 376 (7th Cir. 1983).

STATEMENT OF THE CASE

Petitioners herein are four Wisconsin townships located adjacent to respondent, City of Eau Claire. Respondent used federal funds to construct a sewage treatment facility within its own city limits. This sewage treatment facility is the only such facility available to petitioners and, as a result, respondent enjoys a monopoly in the market for sewage treatment services. Respondent refused to supply sewage treatment services to petitioners, but has provided sewage treatment services to individual landowners within petitioners' boundaries on condition that such landowners agree to annex to respondent and obtain sewage collection and transporation services from respondent. *Town of Hallie v. City of Eau Claire,* No. 80-C-527, slip op. at 1 (W.D. Wis. April 5, 1982). This conduct by respondent prevented petitioners from competing with respondent in providing sewage collection and transportation services to the landowners.

In *Town of Hallie v. City of Eau Claire,* the District Court held that respondent was exempt from the Sherman Act under the "state action" exemption originally articulated by this Court in *Parker v. Brown,* 317 U.S. 341 (1943), and dismissed petitioners' antitrust claims. On appeal the Court of Appeals for the Seventh Circuit affirmed the District Court's decision, stating "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services,

then we can *assume* that the State contemplated that anticompetitive effects might result from the conduct pursuant to that authorization." 700 F.2d at 381 (emphasis added). Additionally, the court held that it was not necessary for upon an assumption that if the state authorized conduct then of the municipality to come within the state action exemption. *Id.* at 384.

SUMMARY OF ARGUMENTS

1. In reaching its decision the Court of Appeals relied upon an assumption that if the state authorized conduct then the state contemplated the anticompetitive effect of such conduct. Congress intended that the antitrust laws be given the broadest application. The assumption utilized by the Court of Appeals is contrary to this intent and jeopardizes the national policy of open competition embodied in the antitrust laws.

2. Active state supervision of the anticompetitive conduct of municipalities is necessary to ensure that the conduct being exempted is truly state action and that the municipality will not abuse its anticompetitive power.

ARGUMENT

I

INTRODUCTION

The decisions of this Court provide that anticompetitive conduct by government is exempt from the federal antitrust laws if the conduct constitutes the action of the state itself, acting in its sovereign capacity, or if it constitutes municipal action in furtherance of a clearly articulated and affirmatively expressed state policy to displace competition with

regulation or monopoly service. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *Parker v. Brown*, 317 U.S. at 350-51.

In its opinion below, the Court of Appeals held that "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can *assume* that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization." *Town of Hallie v. City of Eau Claire*, 700 F.2d at 381 (emphasis added). Additionally, the court held "that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity." *Id.* at 384.

The question presented is what indicia of state involvement are sufficient to clothe a municipality with a state's exemption from the application of the federal antitrust laws. It is respectfully submitted that the standards utilized by the Court of Appeals are inadequate. The decision grants a broad scope of immunity which is contrary to the intent of Congress that the antitrust laws be applied to the full extent of the power of Congress under the Commerce Clause.

II

RELIANCE ON AN ASSUMPTION THAT THE STATE CONTEMPLATED ANTICOMPETITIVE EFFECTS FRUSTRATES THE INTENT OF CONGRESS THAT OPEN COMPETITION BE GIVEN THE BROADEST POSSIBLE PROTECTION

When Congress enacted the federal antitrust laws it intended to exercise to the fullest its power under the

Commerce Clause of the United States Constitution. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980). Consistent with this congressional intent there is a strong presumption against implied exclusion from coverage under the antitrust laws. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 398. As this Court stated in *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975), "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Id.* at 719-20.

The "state action" exemption from the antitrust laws was originally created because of this Court's concern with protecting our federal system of government. In *Parker v. Brown*, 317 U.S. at 350-51, this Court stated:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, when first presented with the question whether a municipal government would be exempt from the provisions of the Sherman Act because of its status as a municipality, a plurality of this Court, relying upon *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), reasoned:

> "These decisions require rejection of petitioners' proposition that their status automatically affords government entities the 'state action' exemption. Parker's limitation of the exemption, as applied by Goldfarb and Bates, to 'official action directed by [the] state,' arises from the basis for the 'state action" doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . . a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred.' To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them . . . . Parker's limitation of the exemption to 'official action directed by a state' . . . is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 411-13 (citations omitted; footnotes omitted).

The plurality opinion in *City of Lafayette* and subsequent cases, *see Community Communications Co. v. City of Boulder, supra*, indicate that the "state action" exemption enunciated in *Parker v. Brown* was intended solely to protect the sovereignty of the states while at the same time fulfilling Congress' intent to protect uninhibited competition.

The Court's indulgence of municipalities does nothing to preserve the states' sovereignty. At most it excuses the state from having to clearly articulate that its legislation is intended to displace competition with regulation or monopoly service. However, when the state fails to clearly

articulate its policy to displace competition it is impossible to balance the states' interest against the national policy of free markets and open competition expressed by Congress in the federal antitrust laws. The Court of Appeals' analysis fails because it assumes that the state intended to displace competition with regulation or monopoly service.

In *Parker v. Brown*, the Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U.S. at 351. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773; *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976); and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, this Court refused to grant state action exemption in situations where the state had authorized the anticompetitive activity. Implicit in these decisions is a recognition that there are situations in which the activity authorized by the state may have anticompetitive effects not contemplated by the state, and therefore would not be the actions of the state. The plurality opinion in *City of Lafayette v. Louisiana Power & Light Co.*, expressly considered this point: "it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the state." 435 U.S. at 406 n.31.

Municipalities continue to be exempt from the provisions of the antitrust laws if they are acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. The states

continue to be free to immunize municipalities from liability under the federal antitrust laws by simply stating that the states deem it to be in the public interest to displace competition with regulation in a field. However, the mere existence of a grant of authority to operate in an area does not establish that a municipality is operating as an agent of the state. By assuming the state contemplated anticompetitive effects merely because the state authorized the conduct involved, the Court of Appeals failed to give effect to the policy enunciated by Congress in the antitrust laws and the strong presumption against implied exemptions from such laws.

III

ACTIVE STATE SUPERVISION IS NECESSARY TO ENSURE THAT ONLY STATE ACTION IS EXEMPT FROM THE CONGRESSIONAL PROHIBITION OF ANTICOMPETITIVE CONDUCT

In its decision, the Seventh Circuit Court of Appeals held that it is not necessary for the state to actively supervise the anticompetitive conduct of a municipality in order for that conduct to come within the state action exemption. 700 F.2d at 383-84. The Court of Appeals distinguished *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, which required active state supervision for the exemption to apply, 445 U.S. at 105, on the grounds that *Midcal* "involved private parties that were given power over price" whereas "[t]his case involves a local government performing a traditional municipal function." 700 F.2d at 384. However, this distinction is without meaning in light of the purpose of the "state action" exemption and is not supported by the court's reasoning.

When a municipality is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, it is exempt from the antitrust laws because in our dual system of government the state is entitled to choose to "effect its policies through the instrumentality of its cities and towns." *Community Communications Co. v. City of Boulder*, 455 U.S. at 51. The municipality is not immune from the antitrust laws because it possessed independent sovereign power. This notion was rejected by this Court in *Community Communications Co. v. City of Boulder*, 455 U.S. at 54. The municipality is immune only when it acts as an instrument or agent of the state to carry out state policy. However, in distinguishing this case from *Midcal Aluminum*, the Court of Appeals failed to consider the basis of the exemption and relied heavily on the fact that the case involved a municipality with independent authority.

The court reasoned:

> "In this context [where the state chose to implement its policy through private parties], the requirement of active state supervision ensures that private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake." 700 F.2d at 384.

The Court of Appeals continued that, with respect to this case, such supervision is unnecessary because "local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority." *Id.*

Such reasoning ignores reality and the cases which have previously come before this Court. Many municipalities

act pursuant to their own police power. *Community Communications Co. v. City of Boulder* presented one such instance. With respect to such municipalities, the Court of Appeals' reasoning is completely misplaced. Even in situations where local government entities are authorized to operate in certain areas by state law, it is not assured that restraints will be placed on the exercise of the power by local entities or that the local entities will exercise that power in a way consistent with state policy.

In *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (N.D. Ill. 1984), a case currently pending in the United States District Court for the Northern District of Illinois, it was alleged that the defendants, a county and a municipality, used their monopoly power over sewer service to prevent the development of land. *Id.* at 13. In denying defendants' motion to dismiss plaintiffs' antitrust claims on the ground that their action was exempt under the "state action" exemption, the court stated:

> "We have studied in detail the authorities cited by defendants in support of their immunity argument and do not find them convincing. We do not find in any of these statutes and regulations a legislative intent to permit a local governmental unit to use its powers in the sewage treatment field simply for the purpose of stopping the development of land. . . . Nothing in the statutes or regulations cited by defendants authorizes or even contemplates that defendants' power could be used to such an end. It is one thing to say that defendants were authorized under state law to control sewage treatment in their region. But 'even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.'" *Id.* at 14 (citations omitted; footnotes omitted).

Although it has yet to be decided in *LaSalle National Bank v. County of Lake* whether or not the defendants actually abused their power in the manner alleged, the case demonstrates that it is entirely possible for a municipality to utilize a specific grant of authority for an anticompetitive purpose which is inconsistent with the state's policy. *See also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 406 n.31 (it would not hinder governmental programs to apply antitrust laws to a city authorized to provide services on a monopoly basis if the conduct complained of was not itself directed by the state).

Finally, the Court of Appeals reasoned that "[a] requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin." 700 F.2d at 384. This Court addressed a similar argument in *Community Communications Co. v. City of Boulder* in which it was argued that to deny the "state action" exemption in that case would have serious and adverse consequences for cities and would unduly burden the federal courts. The court rejected this argument by stating "this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." 455 U.S. at 56 (footnote omitted). Additionally, the conclusion of the Court of Appeals is simply a restatement of the argument rejected by this Court in *Community Communications Co. v. City of Boulder* where it was held that the "Colorado Home Rule Amendment's 'guarantee of local autonomy,'" 455 U.S. at 54, did not immunize the city from application of the federal antitrust laws. *Id.* at 55-56.

The "state action" exemption is not designed to protect local autonomy. It was created because of the recognition that states, acting as sovereign, may choose to effect their policy through the instrumentality of their cities. *Id.* at 51. To require that the state supervise the anticompetitive conduct engaged in by a city when carrying out the state's policy will not interfere with the sovereignty of the state. However, as is the case when the state implements its policy through private parties, active state supervision of the municipality's conduct will ensure that the municipality does not abuse its anticompetitive power and that it acts pursuant to the state policy at stake. As was recognized by the plurality in *Lafayette v. Louisiana Power & Light Co.*:

> "[Local governmental units] may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408 (footnote omitted).

To require active state supervision of the anticompetitive conduct of municipalities would help to preserve the free markets and open competition embodied in the antitrust laws.

With respect to anticompetitive conduct engaged in by private parties pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, active state supervision tests whether the challenged activity is

truly state action and, therefore, immune. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 104-06. *See also* P. Areeda, *Antitrust Law* § 212a at 47 (Supp. 1982). Active state supervision of the anticompetitive conduct of municipalities would serve this same function. It would demonstrate that the activities for which immunity is claimed by the municipality are truly state action.

CONCLUSION

The "state action" exemption from the antitrust laws results from a recognition that ours is a dual system of government and is designed to protect the sovereignty of the states. Balanced against these policies is the policy embodied in the federal antitrust law to protect uninhibited competition and our free enterprise system. The minimal indicia of state action utilized by the Court of Appeals to determine whether the conduct by the City of Eau Claire was an action of the state are inadequate. A substantial probability has been created that municipalities may override the policies of the Congress of the United States. Therefore, PLF respectfully urges that the decision of the Court of Appeals for the Seventh Circuit be reversed.

July 26, 1984.

Respectfully submitted,

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